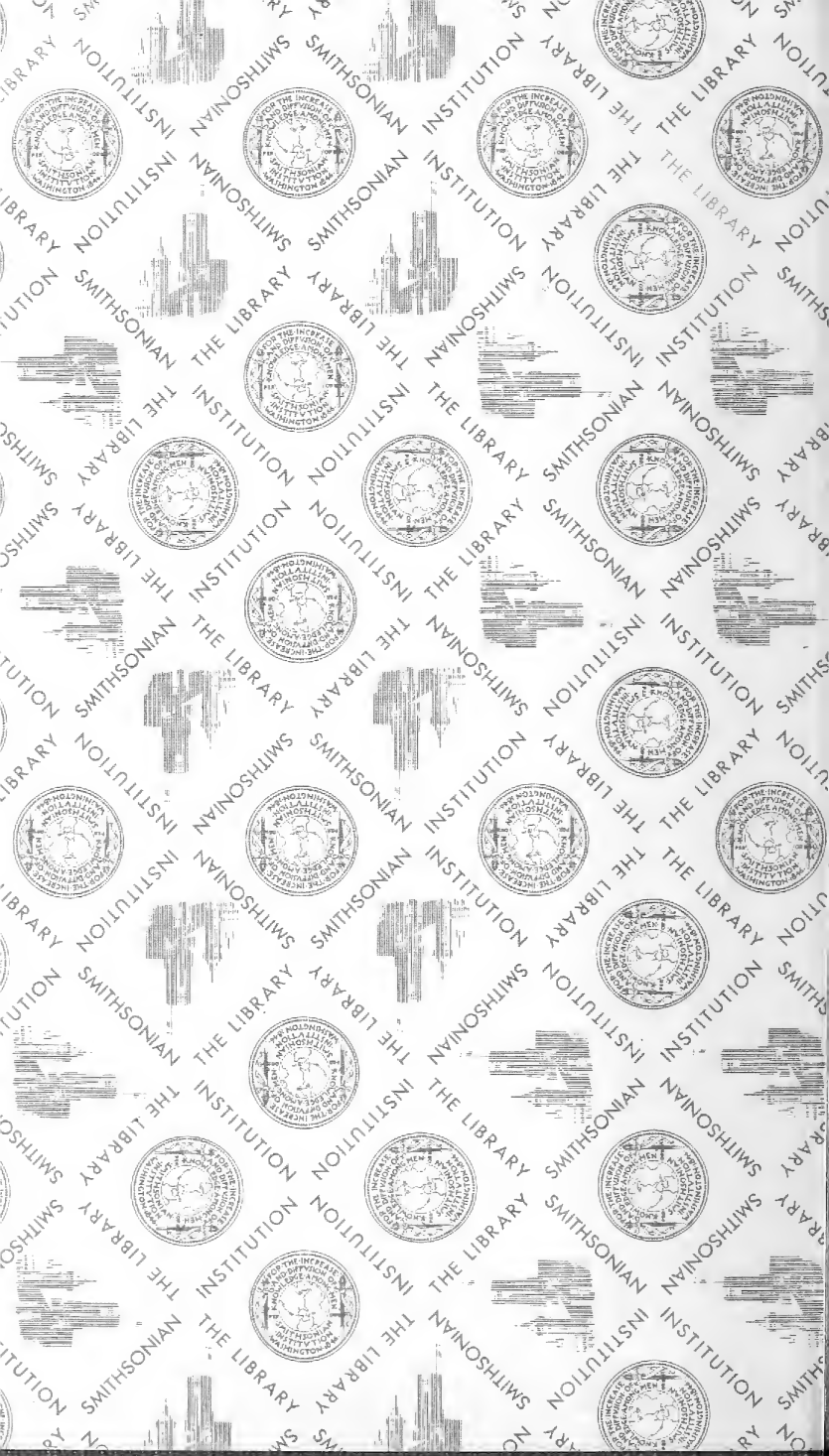
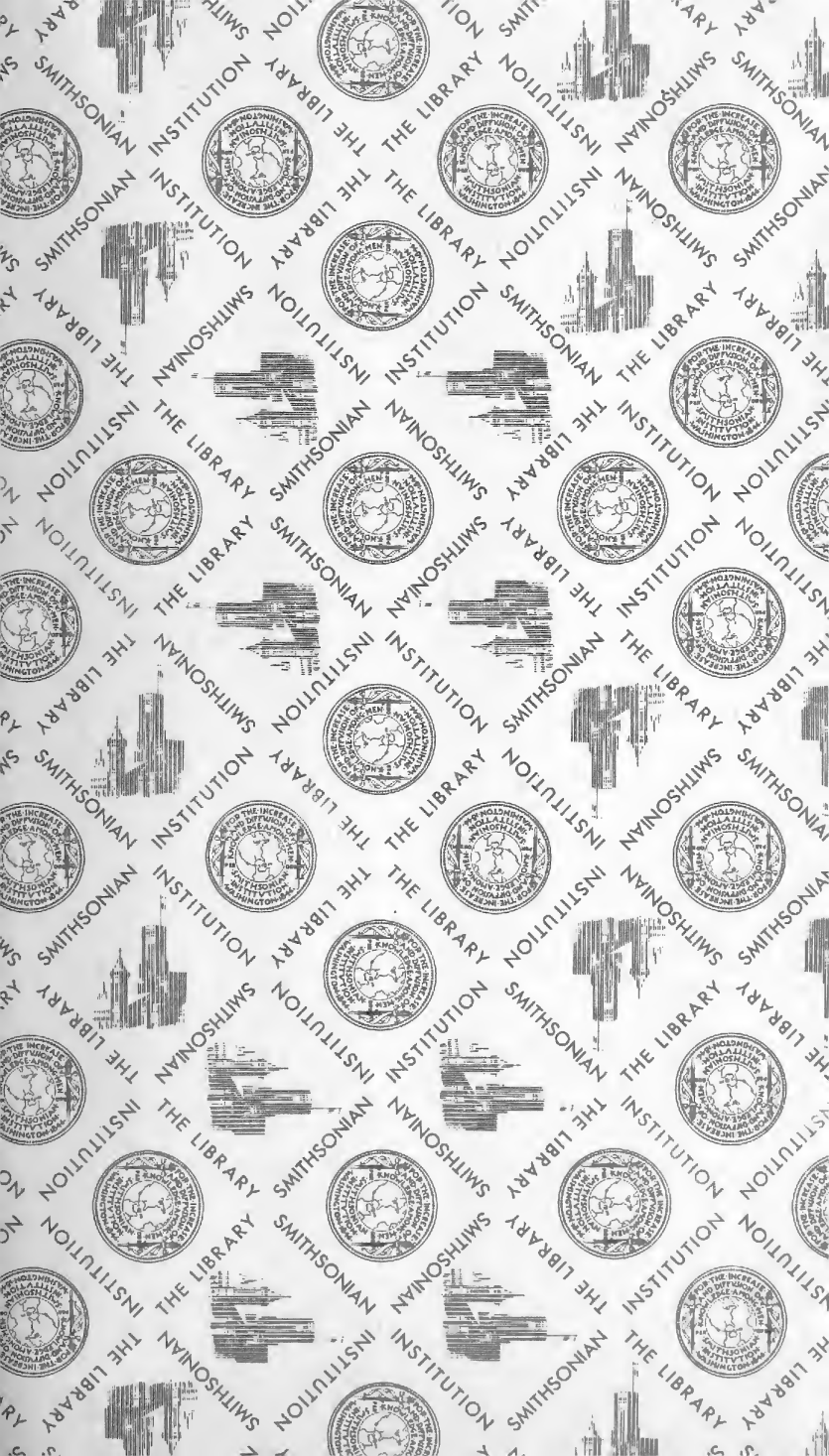


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ARGUMENT

BEFORE THE

HON. B. H. BRISTOW,

SOLICITOR-GENERAL OF THE U. S.

SHOWING THAT THE

Central Branch Union Pacific

RAILROAD COMPANY

Is entitled to continue and extend its road to the "Main Trunk,"
(the Union Pacific Railroad,) and for and in aid of the
construction thereof to receive Lands and
Bonds from the United States,

By Effingham H. Nichols, Counsellor-at-Law.

Fundamentum autem justitiæ est fides, id est dictorum conventorumque
constantia et veritas.—*Cicero, Off. 1, 7.*

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
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BEFORE THE

HON. B. H. BRISTOW,

SOLICITOR-GENERAL OF THE UNITED STATES.

Mr. Solicitor-General:

I know of no acts of Congress in the interest of progress and peace more *special* in their character than the acts providing for the construction of the Pacific railroad.

I care not how familiar the mind may be with subjects of ordinary legislation, it requires preparation to understand aright the meaning and purpose of the provisions of these acts.

He who would read them intelligently must take into view the surrounding circumstances in the presence of which and with reference to which they were passed.

The case we are about to consider arises under these acts, and relates to the *completion* of one of the branches of the Pacific railroad, known as the road of the Central Branch Union Pacific Railroad Company.

I shall assume, that you are already familiar with the arguments heretofore submitted to the Secretary of the Interior—that you are familiar with the *general plan* of the Pacific railroad—that though divided into a “*main trunk*” and “*branches*,” it nevertheless was designed and intended to be a *unit*, and each and every part thereof an *integral* portion of that *unit*—that you are also familiar with the progress of the work—that the Branch, the *right* to complete which forms the subject of our present consideration, has been constructed “for one hundred miles in length next to the Missouri river”—and assuming this, I will proceed at once to lay

before you our views of the case upon which your judgment has been invoked.

On the 30th day of October last the Secretary of the Interior transmitted to the President of the United States, for his *approval*, a map showing the "*general direction and route*" of the proposed continuation and extension of the road of the Central Branch Union Pacific Railroad Company from its present terminus at Waterville, on the meridian of Fort Riley, to a connection with the Union Pacific railroad at the one-hundredth meridian west from Greenwich.

The *approval* is asked for under the provisions of the 9th section of the act relating to the Union Pacific railroad and its branches, approved July 1, 1862, and the 16th section of the act amendatory thereof, approved July 2, 1864. As the approval of this map will necessarily recognise the *right* of the company to make the proposed continuation and extension of its road under the provisions of the 16th section of the act, approved July 2, 1864, it becomes necessary that we lay before you the law upon which this right is based.

1.—THE PRESENT STATUS OF THIS CASE.

In April last the company presented to the Secretary of the Interior a petition, in which the company claimed :

First. That the Pacific railroad provided by the acts of Congress approved July 1, 1862, and July 2, 1864, was designed and intended to be *a unit*, and each and every part thereof *an integral* portion of that unit ;

Second. That the road of the Central Branch Union Pacific Railroad Company is a *part* of the Pacific railroad, and that, as such, the Company is *entitled*, under the provisions of the act of 1864, *to continue and extend its road* from its present terminus, one hundred miles west of Atchison, to a connection with the Main Trunk, (the Union Pacific,) and for and in aid of the construction thereof *to receive lands and bonds* from the United States ; and

Third. That *the right* of the Central Branch Union Pacific

Railroad Company to thus continue and extend its road, and for and in aid of the construction thereof to receive lands and bonds, has *not been divested* by any subsequent acts of Congress.

The company therefore asked :

First. That the Central Branch Union Pacific Railroad Company may be permitted, in accordance with the law, to *file its map*, showing the extension and continuation of its road and telegraph line, in "the general direction and "route" of the road *through Kansas*," to a connection with the "Main Trunk" (the Union Pacific) at the one-hundredth meridian ;

Second. That the Secretary of the Interior, by proper order, *withdraw from pre-emption, private entry, and sale* the Government lands for the distance of twenty-five miles on each side of the line indicating such extension and continuation of the road of your petitioner to its connection, as aforesaid ; and

Third. That the Secretary of the Interior make such *general order* in the premises as will secure to the petitioner its grants and subsidies for said extension, as the same are warranted by law, and its rights in the premises, to the end that your petitioner may be no longer delayed in the prosecution of its work, or in the receipt of the lands and bonds to which it shall be entitled as the sections of twenty miles each of said extension shall from time to time be completed.

Arguments in the case were heard by the Secretary of the Interior and by Assistant Attorney-General Smith, on the 24th, 25th and 26th of April. Pending their consideration, the Secretary submitted to the then Attorney-General certain questions. On the 3d of June, the Attorney-General transmitted to the Department of the Interior his opinion upon the questions submitted. On the 17th of June, the counsel, by letter, asked opportunity to be further heard before the final determination of the case, stating that there were important facts and decisions relating to the matter to which no reference had been made, and to which

they deemed it of the highest importance that attention should be called. On the 28th of August, the Secretary of the Interior, in pursuance of a letter of the Attorney-General, dated August 11, returned to the Attorney-General his opinion, stating that there were facts in the case which had not been considered, and that the parties therefore, according to the terms of said letter of August 11, were entitled to a rehearing. On the 3d of October, an important decision was made in the Department of the Interior, in the case of the Kansas Pacific Railway *vs.* the Union Pacific Railway, Southern Branch, which brought to light *two important facts* bearing upon the rights of the Central Branch Company, to wit:

1st. That the Kansas Pacific Railway Company, formerly known as the Union Pacific Railway, Eastern Division, had neglected to obtain the *approval* of the President of the United States to their route west of the meridian of Fort Riley; and,

2d. That they had neglected to file in the Department of the Interior, *within the time required by law*, a map of the route approved as aforesaid.

This *route* never having been *approved* by the President of the United States at the instance of the Kansas Pacific Railway Company, whose duty it was, under the acts, to obtain such approval, it became necessary that the Central Branch Company should obtain such approval from the President of the United States before further proceeding with its application. The company, therefore, through its counsel, by letter dated October 20th, after calling the attention of the Secretary of the Interior to his decision of October 3d, and the facts named, withdrew its application for the withdrawal of lands, &c., and asked that no further action respecting the case should be had until the application should be renewed; at the same time stating that the company was having *a map* made of the route west of the meridian of Fort Riley from "*actual survey*," as required by the statute. Subsequently, the map

having been completed and duly verified, the company on the 26th day of October transmitted the same to the Department of the Interior for the *approval* of the President of the United States, inclosing therewith a certified copy of a resolution of its Board of Directors, adopting the route shown by the full red line on said map if the same should be approved by the President of the United States, as indicating “*the general direction and route*” of the continuation and extension of its road under the provisions of the 16th section of said act of Congress, approved July 2, 1864; and, as stated, on the 30th of October, the Secretary of the Interior caused said map, together with said resolution and letter, to be transmitted to the President of the United States.

2.—THE CENTRAL BRANCH COMPANY IS ENTITLED TO A CONNECTION AND TO LANDS AND BONDS IN AID OF THE CONSTRUCTION THEREOF.

We will now examine the *right* of the company to continue and extend its road from its present terminus to a connection with the Union Pacific railroad at the one-hundredth meridian of longitude west from Greenwich, and for and in aid of the construction thereof to receive lands and bonds from the United States.

The act of July 1, 1862.

The entire road, under the Pacific railroad act of 1862, was designed and intended to be a *unit*. This is clear from both the title and body of the act. The road was divided into a “main trunk” and “branches.” The main trunk was to commence at a point on the one-hundredth meridian, to be fixed by the President of the United States, and thence run westerly. The branches, which were designed to diffuse the benefits of the main trunk, were four in number: the Sioux City, the Omaha, “the road through Kansas,” (commencing at the mouth of the Kansas river,) and the extension of the Hannibal and St. Joseph railroad from Atchison west. The construction of different portions or sections of the road was

assigned to different companies. Subsidies in lands and bonds were pledged to each in aid of the construction thereof. The statute clearly sets forth the "*terms and conditions*" upon which the main trunk was to be constructed, and it provides that each of the branches shall be built upon the "*same terms and conditions,*" with the exception that, *in addition* to the terms and conditions referred to, *further* terms and conditions were imposed upon the company constructing "the road through Kansas."

The extension of the Hannibal and St. Joseph Railroad Company was to be constructed under a Kansas railroad charter to be selected by the Hannibal and St. Joseph Railroad Company, while the construction of "the road through Kansas" was assigned to the Leavenworth, Pawnee, and Western Railroad Company, afterward known as the Union Pacific Railway Company, Eastern Division, and now known as the Kansas Pacific Railway Company. The extension, under the law, of the Hannibal and St. Joseph railroad was from Atchison west one hundred miles to connect and unite with "the road through Kansas;" and "the road through Kansas" was to extend from the mouth of the Kansas river to a connection with the main trunk at the one-hundredth meridian. The Hannibal and St. Joseph Railroad Company transferred all its rights to the Central Branch Company, a Kansas corporation.

The *further* "terms and conditions" imposed upon the Kansas Pacific Railway Company in the construction of "the road through Kansas" are set forth in the ninth section of the act of 1862, and are as follows:

"Said railroad through Kansas shall be *so located* between the mouth of the Kansas river, as aforesaid, and the aforesaid point on the one-hundredth meridian of longitude, that the several railroads from Missouri and Iowa, herein authorized to connect with the same, *can make connections within the limits prescribed in this act*, provided the same *can* be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas, west of the meridian of Fort Riley, to the afore-

“said point on the one-hundredth meridian of longitude, to be subject to the approval of the President of the United States, and to be determined by him on actual survey.”

This was the condition of things under the act of 1862.

The act of July 2, 1864.

Most prominent among the provisions of the act of 1864 is the 16th section. Taken in connection with previous legislation, it *absolutely guarantees a continuous line* of railway from *each* of the designated points on the Missouri river to the Pacific coast, and *protects* each company acting in good faith against the *failure* or *omission* of any other company to construct its portion of the line. It provides that—

1st. “Any two or more of the companies authorized to participate in the benefits of this act are hereby authorized at any time to unite and consolidate their organizations as the same may or shall be upon such terms and conditions, and in such manner as they may agree upon.”

2d. “In case, upon the completion by such consolidated organization of the roads, or either of them, of the companies so consolidated, any other of the road or roads of either of the other companies, *authorized as aforesaid, (and forming, or intended or necessary to form, a portion of a continuous line from each of the several points on the Missouri river hereinbefore designated to the Pacific coast,)* shall not have constructed the number of miles of *its said road* within the time herein required, such consolidated organization is hereby authorized to continue the construction of *its road and telegraph in the general direction and route upon which such incomplete or unconstructed road is hereinbefore authorized to be built*, until such continuation of the road of such consolidated organization shall reach the constructed road and telegraph of said other company, and at such point to connect and unite therewith; *and for and in aid thereof the said consolidated organization may do and perform in reference to such portion of road and telegraph as shall so be in continuation of its constructed road and telegraph, and to the construction and equipment thereof, all and singular the several acts and things hereinbefore provided, authorized or granted to be done by the company hereinbefore*

“authorized to construct and equip the same, and *shall be entitled to similar and like grants, benefits, immunities, guarantees, acts, and things to be done and performed by the Government of the United States, by the President of the United States, by the Secretaries of the Treasury and Interior, and by commissioners, in reference to such company, and to such portion of the road hereinbefore authorized to be constructed by it, and upon the like and similar terms and conditions, so far as the same are applicable thereto.*”
And

3d. “In case any company authorized thereto shall not enter into such consolidated organization, such company, upon the completion of its road, as *hereinbefore provided, shall be entitled to and is hereby authorized to continue and extend the same under the circumstances, and in accordance with the provisions of this section, and to have all the benefits thereof as fully and completely as are herein provided touching such consolidated organization.*”

The object seemed to be to make every possible provision to secure the construction of the road: 1st, for the purpose of giving greater strength to the companies, and power of execution, any two or more of them were authorized at any time to unite and consolidate their organizations. And, 2d, for the purpose of making the connections complete, so that the line from each of the designated points on the Missouri river to the Pacific coast might be one and continuous, they were authorized, after completing their roads, to construct any other parts, portions, or sections of the plan which had been assigned to any other company to construct, in case such portion should not be constructed within the time required. But as Congress had no power to compel the companies to consolidate, they therefore further provided that *any one* of the companies authorized to participate in the benefits of the act, upon the completion of its road “shall be entitled to and *is hereby authorized to continue and extend the same*” in case of the non-construction of any other part or section of the road forming, or intended or necessary to form, a portion of a continuous line from the Missouri river to the Pacific coast, in accordance with the *plans as then established and authorized.*

The 7th section of the act of 1864 provided: "And the failure of *any one* company to comply fully with the *conditions and requirements* of this act and the act to which this is amendatory shall not work a forfeiture of the *rights, privileges, or franchise* of any *other* company or companies that shall have complied with the same."

It cannot be doubted but that the object and effect of this legislation was to inspire confidence. The companies were no longer at the mercy of each other, and any company putting in its money in good faith to construct the section assigned to it was protected against loss by reason of the failure of any other company to complete its portion of the road. Whatever right or privilege any one of these companies acquired under the act of 1862, that right or privilege was *enlarged* by the act of 1864. Under the act of 1862, the Central Branch Company had the right to construct "one hundred miles in length next to the Missouri river" on the terms and conditions named. But under the act of 1864, the right or privilege of the Central Branch Company was *such* as to entitle and authorize it to construct a railroad and telegraph line *all the way from the Missouri river to the one-hundredth meridian*, and to receive in aid of the construction thereof lands and bonds, *in the event* "the road through Kansas" (forming a part of the then authorized plan) should not be constructed in the manner and within the time required.

The particular clause in this 16th section of the act of 1864 to which we now invite special attention reads as follows:

"In case any company authorized thereto shall not enter into such consolidated organization, such company, upon the *completion* of its road, as *hereinbefore provided*, shall be *entitled* to and *is hereby* authorized to *continue and extend* the same under the *circumstances*, and in accordance with the *provisions* of this section, and to have *all the benefits* thereof *as fully and completely as are herein provided touching such consolidated organization.*"

Under this provision two important inquiries arise.

1. Has the Central Branch Company *completed* its road "*as hereinbefore provided?*" and
2. Has a case of "*the circumstances*" referred to arisen?

The Road has been completed "as hereinbefore provided."

Under the act of 1862 this branch, like all other parts of the Pacific railroad, was subsidized.

FIRST. Such is the *presumption*.

1. All other sections or parts were subsidized ; *why not this?*

2. They were all *limited* in distance, the same as this. The designated termini to which the other companies were to build operated as *limits* just as effectually as if a *number of miles* had been named, as in our case.

3. We had a greater claim on Congress for subsidies than any other company. We had penetrated the West nearly two hundred miles further. We had not only crossed the Mississippi river, but actually reached the Missouri river. Unlike the other companies, we represented *actual, existing* interests, not anticipated and future interests. The *presumption* is that we were at least as well provided for in building *our* part of the Pacific road as any other company in building *its* part.

4. "All compensation for service rendered for the Government" and "at least five per centum of the *net earnings* of said road" were to be applied to the payment of said bonds and interest. (Sec. 6, act of 1862.) A *break* of, say, five miles would make it difficult to calculate these amounts, and a *break* is not contemplated by the language, and the *presumption* is against it.

5. The act was entitled "An act to aid in the construction "of a railroad and telegraph line from the Missouri river "to the Pacific ocean," &c.—not an act to aid in the construction of a *part* of a railroad and telegraph line, &c. ; and "to secure to the Government the use of *the same* for

“postal, military, and other purposes”—not to secure to “the Government the use of *a part* of the same, &c.

Some of these comments may not apply to what is known as the “*Henderson proviso*,” but they do apply to the act as *originally* drafted and reported. The *Henderson proviso* was the result of afterthought, and was intended to meet the jealousies of St. Joseph, and accompanied with such restrictions as to destroy its utility. It provided an *alternative* route, which has not been availed of, and the *proviso* is therefore now a *dead letter* in the statute.

Such, then, being the *presumption*, let us now examine the *letter* of the statute, and

SECOND. Such is the *letter* of the statute.

1. The statute authorized the Central Branch Company to *extend* its road westerly “upon the same terms and “conditions in all respects for *one hundred miles in length* “next to the Missouri river;” and the *object* and *purpose* of this extension of one hundred miles was *briefly* but *distinctly* stated to be “*to connect and unite with the road “through Kansas.*” The statute does not say (as in *all other* places relating to the other ranches) “*so as to connect and unite*”—that is “*until it connects and unites.*” The words “*to connect and unite*” are not used to designate a *point* to which the company may extend its road, but the *purpose* or *object* of the extension.

“*To connect*” has a different purport from the words “*so as to connect,*” as used in same section and in sections 9 and 14, where the length of road to be constructed is determined by the *designation of its terminus* and not by the *number of miles* to be constructed.

The word “*to,*” as a preposition, signifies *approach*, and is the opposite of *from*, as in the words “I am going *to* “Washington,” and “I am going *from* Washington.” But it is as often used as a mere *prefix* to indicate the infinitive mood, and when so used, the words taken together frequently denote the *object* or *purpose* in view. In the case before us it is a prefix to the words “*connect and unite,*”

and the words "*to connect and unite*" are equivalent to *for the purpose of connecting and uniting*. If I were to say, "I am going to the Ebbitt House *to dine*," would you not infer that my object and purpose in going to the Ebbitt House was *to dine*, and that I intended to dine *there*, and *not elsewhere*? So here the object and purpose of constructing "one hundred miles in length next to the Missouri river" was "*to connect and unite*" with "the road through Kansas," and the connection was to be made *there at the end of the one hundred miles and not elsewhere*.

2. But what provision was there that "*the road through Kansas*" should be *so located* that we could make the connection within the limits prescribed; that is, the one hundred miles? By an examination of the ninth section we find that this branch, called "*the road through Kansas*," was to be built by the Leavenworth, Pawnee, and Western Railroad Company, afterward known as the Union Pacific Railway Company, Eastern Division, who were authorized to construct it. We further find it was to be constructed "upon the same terms and conditions, in all respects, as are provided in the act for the construction of the railroad and telegraph line first mentioned, (*the Main Trunk*,") excepting that *in addition* to the terms and conditions referred to, the following *further terms and conditions* are imposed, viz:

"Said railroad through Kansas shall be *so located* between the mouth of the Kansas river, as aforesaid, and the aforesaid point on the one-hundredth meridian of longitude; that the several railroads from Missouri and Iowa, herein authorized to connect with the same, *can* make connections *within the limits prescribed in this act*, provided the same *can* be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas, west of the meridian of Fort Riley, to the aforesaid point on the one-hundredth meridian of longitude, *to be subject to the approval* of the President of the United States, and to be *determined* by him on *actual survey*."

What is the meaning of the words, and what "*limits*" are referred to by the words, "*within the limits prescribed in this act*?"

The answer seems too obvious for discussion. Let us analyze the language. If the Eastern Division Company undertook to avail themselves of the benefit of the Pacific Railroad act, they would be obliged to observe these terms and conditions. They would be compelled to *locate* the road in accordance with the requirements of the statute. The *command* of the statute would apply to *that* company, while *our* company would remain *passive*. But as to the meaning of the words "*within the limits prescribed in this act*," they certainly have reference either to the limits "between the mouth of the Kansas river" and "the one-hundredth meridian of longitude," or they have reference to the *limits prescribed* with reference to the roads from Missouri and Iowa.

It certainly cannot refer to the former. The *formation* of the sentence forbids it. The limits of "the mouth of the Kansas river" and "the one-hundredth meridian" having been already mentioned, the language would have been "*within said limits*;" whereas the words "*within the limits prescribed in this act*" would seem to imply some *other* limits than those which had just been named; and to refer to some limits which, upon examination of the act, would be found to be prescribed in some *other section* of the act.

There would be no wisdom in Congress requiring that the road should be "so located" *between* the mouth of the Kansas river and the one-hundredth meridian of longitude, that it should be located *between* those places, for it would be *physically impossible* for the railroads from Missouri and Iowa *not* to be able to make the connection within those limits, unless we suppose that the object of the statute was to prevent the Eastern Division Company from constructing their road *around the world*, in order to avoid making a *direct* connection with the one-hundredth meridian. Now, as has been well said, "it is not to be presumed that Congress would have done, or did do, a vain or needless thing."

It is a matter of history, of which there is undoubted evidence, that at the time of the drafting of this act it was in contemplation to provide that another road from Iowa should also be authorized to connect with "the road through Kansas," within the limits of about one hundred and fifty miles, and the language of the statute was designed to provide for both this road and the road from Missouri. For certain reasons, however, all provision for this road from Iowa was omitted in the act of 1862, though provision was afterward made for it in the act of 1864, and it follows that the *only* "limits" referred to were the limits *prescribed* in reference to *our road*. "The road through Kansas" was to be so located that our road could make connection "within the limits prescribed."

But the statute proceeds: "*Provided*, That the same *can* "be done without deviating from the general direction of "the whole line to the Pacific coast." The word "*can*" had reference to *physical possibility*; and the possibility that the lay of the country might be such as to forbid the connection being made "within the limits prescribed" accounts for the further provision which is made for the *determination* of the *route*, and the *settlement* of any *dispute* that might arise in reference thereto between the Eastern Divison Company and the companies whose roads were to be authorized to connect with "the road through Kansas," viz: "That "the route in Kansas, west of the meridian of Fort Riley, "to the aforesaid point on the one-hundreth meridian of "longitude, to be subject to *the approval of the President of "the United States*, and to be determined by him on *actual "survey*."

It clearly follows that the words, "within the limits prescribed," so far as the Central Branch Company is concerned, have reference to the limit of *one hundred miles*.

It may be that while such was not the original intention of Congress, yet if the President of the United States, in determining the route of "the road through Kansas," had, in consequence of the topography of the country, in the

exercise of his judgment, so located the road that we could not make the connection "within the limits prescribed," we should have been compelled to have completed the connection. But we are prepared to show that the topography of the country is such as to present *no physical barrier* in the way of "the road through Kansas" having been so located that we could make the connection "within the limits prescribed."

3. The language of the statute is "not upon the *completion* of its road," but "upon the completion of its road *as hereinbefore provided.*" The road is not completed, nor will it be until it shall be constructed to a connection with the "main trunk." But the road is, nevertheless, completed "*as hereinbefore provided.*" The only distance "*hereinbefore provided*" was "*one hundred miles in length next to the Missouri river.*" This "one hundred miles in length next to the Missouri river" has been built and completed, and the company has therefore completed its road "*as hereinbefore provided.*"

4. In accordance with the statute we have built our road in "the general direction of the whole line to the Pacific coast," (sec. 9, act of 1862,) that is, "westerly upon the most direct, "central, and practicable route." (Sec. 8, act of 1862.) In good faith to the Government it could not have been built otherwise. The route has been adopted and approved by the Government and the road accepted section by section as each section was from time to time completed. But what I wish to call your special attention to is that, as was contemplated by the statute, in thus constructing our one-hundred miles of road we have reached *the meridian of Fort Riley*. There are *two* meridians referred to in the Pacific railroad laws—the *one-hundredth meridian* and the *meridian of Fort Riley*. They *both* designate lines which *separate* important parts of the Pacific railroad. Beyond the meridian of Fort Riley the *route* of the road through Kansas, by the terms of the act, is "subject to the *approval* of the President of the "United States, and *to be determined* by him on *actual sur-*

“*vey.*” Until this route is *so determined* and *so approved*, we cannot proceed, because by the terms of the 16th section of the act of 1864 we are *only* authorized to continue and extend the construction of our road in “*the general direction and route*” upon which the unconstructed road [“the road through Kansas”] was “*hereinbefore authorized to be built.*” The language of the act, applying it to the case under consideration, is that the Central Branch Company “*is hereby*” “authorized to continue the construction of its road and “telegraph in the *general direction and route* upon which “such incomplete or unconstructed road [‘the road through “Kansas’] *is hereinbefore authorized to be built.*” That route has neither been determined by the President nor approved by him. This is a most important fact, and in connection with what has been said and the requirements of the statute, is conclusive upon the point that the Central Branch Company *has completed its road “as hereinbefore provided.”*

A case of “the circumstances” has arisen.

In the case of The Kansas Pacific Railway vs. The Union Pacific Railway, Southern Branch, already referred to, the Secretary of the Interior held :

1st. That “the Kansas Pacific Railroad *did not acquire* “any grant to the lands west of the meridian of Fort Riley “under *the act of 1862*, because it did not procure the *approval* of the President of the United States to the route.”

2d. That “it *did not acquire* any grant under *the act of 1864*, because it did not secure the *approval* of the President to the route west of the meridian of Fort Riley, and “*did not file* its map of such change of route within the “three years from the first day of July, 1862.”

It appears, upon examination of the records in the Department of the Interior, that the company never obtained the *approval* of the President to its route west of the meridian of Fort Riley ; nor did it, within the *three years* provided by section 7 of the act of 1862, and section 5 of the act of 1864, *file* in the Department of the Interior a

map of the route thus approved. That company therefore failed to comply with the conditions and requirements of the acts of 1862 and 1864, and, having failed to comply with those conditions and requirements, it was unable, under these acts, to construct and complete that portion of the road assigned to it lying west of the meridian of Fort Riley. It failed to comply with the *primary essentials* of the law, and therefore could not construct, nor receive any aid in so doing. The law required the company, within the three years, to designate the general route of its road, and file its map, after being duly approved by the President, in the Department of the Interior, "*whereupon*," the statute says, "the Secretary of the Interior shall cause the lands * * * * * to be withdrawn from pre-emption, private entry, and sale."

There was no authority upon the part of the Secretary to withdraw the lands upon any route other than upon a route that should be thus designated by the company and approved by the President, and of which a map should be thus filed. And if there was no authority to withdraw, there was no authority to *patent lands*; and if there was no authority to patent lands, there was no authority to *issue bonds*.

The act of 1862 is so framed that it extends aid to no company excepting upon a *strict compliance* with its provisions. The primary and fundamental provisions with reference to the Kansas Pacific Railway Company were, that it *shall* file its "*assent*" to the act; that it *shall* "*designate the general route*" of its road; that the road "*shall be so located*" as to comply with the provisions of the statute; that the route in Kansas, west of the meridian of Fort Riley, "*be subject to the approval*" of the President of the United States, and "*be determined by him on actual survey*;" and that the company shall file a map of the route thus *designated*, so *located*, so *approved*, and so *determined upon actual survey*, in the Department of the Interior "*within three years*" from the first day of July, 1862.

By reference to sections three, four, and five of the act of 1862, we shall see that lands were to be patented and bonds issued *only* in the event of the company complying with these preliminary requirements.

Section 3 provided "that there be and is hereby granted
"to said company for the purpose of aiding in the construc-
"tion of *said* railroad and telegraph line * * * every
"alternate section of public land designated by odd
"numbers," &c.

Section 4 provided "that whenever said company shall
"have completed twenty (originally forty) consecutive
"miles of any portion of *said* railroad and telegraph line
" * * * the President of the United States shall ap-
"point three commissioners to examine *the same* and to
"report to him in relation thereto, and if it shall appear to
"him that twenty consecutive miles of *said* railroad and
"telegraph line shall have been completed and equipped in
"all respects *as required by this act*, then, upon the certifi-
"cate of said commissioners to *that effect*, patents shall issue
"conveying the right and title to said company." And,
further, "that no such commissioners shall be appointed by
"the President of the United States unless there shall be
"presented to him a statement, verified on oath by the
"President of said company, that *such* twenty miles have
"been completed," &c.

Section 5 provided "that for the purposes herein men-
"tioned, the Secretary of the Treasury shall, upon the cer-
"tificate, in writing, of said commissioners of the comple-
"tion and equipment of twenty consecutive miles of *said*
"railroad and telegraph *in accordance with the provisions of*
"*this act*, issue to said company bonds of the United States
"of one thousand dollars each," &c.

These provisions all have reference to *said* railroad and *said* telegraph line, and lands are only to be patented upon its appearing that twenty consecutive miles of *said* railroad and *said* telegraph line have been completed and equipped in all respects *as required by this act*; and bonds are only to

be issued upon the certificate of the commissioners of the completion and equipment of twenty miles of *said* railroad and *said* telegraph line *in accordance with the provisions of this act*.

The Kansas Pacific Railway Company having failed to comply with the acts of 1862 and 1864, and never having built the road therein provided for, (that is, that portion thereof lying west of the meridian of Fort Riley,) and the time having elapsed within which they were to build the same, and the Central Branch Company having completed its portion of the road, (that is, the one hundred miles, the construction of which was assigned to that company,) a case of "*the circumstances*" has arisen.

Such being the fact, the Central Branch Company is not only "authorized" but "entitled" to continue and extend its road to a connection with the main trunk at the one-hundredth meridian, and for and in aid of the construction thereof "entitled to similar and like grants, benefits, immunities, guarantees, acts, and things to be done and performed by the Government of the United States, *by the President of the United States*, by the Secretaries of the Treasury and Interior, and by commissioners."

Among "*the acts and things*" to be done and performed by the *President of the United States* for the Kansas Pacific Railway Company was the *approval* of its route west of the meridian of Fort Riley. The Central Branch Company is entitled to have a similar and like act and thing done for it. It is necessary that this should be done, because by the language of the statute it is only authorized to continue the construction of its road and telegraph "*in the general direction and route*" of the line which may be thus *approved* by the President of the United States, and until that is done no *definite location* of its road can be made.

The Act of July 3, 1866.

A further question in this connection remains to be considered. Has the right of the Central Branch Company to thus

continue and extend its road, and for and in aid of the construction thereof to receive lands and bonds, been *divested* by any subsequent legislation? This leads us to the examination of the act of July 3, 1866.

I. In order to show that the right of the Central Branch Company has been divested by this act, it is necessary to maintain one of the two following propositions:

1st. That the act of 1866, *by its terms*, repeals the right of the Central Branch Company to continue and extend its road under the provisions of the act of 1864; or,

2d. That the act of 1866 is so inconsistent with, and so repugnant to, the right of the Central Branch Company to continue and extend its road, that it repeals that right *by implication*.

An examination of the act itself shows that the former of these propositions cannot be maintained, for the act does not allude to that company. The second proposition relates to what is known in law as repeal by implication. Upon this subject the decisions are uniform. Repeal by implication only exists where both statutes *cannot stand together or co-exist*—where both statutes in the nature of things *cannot be executed*. Such is not the case with these statutes. There is nothing in the act of 1866 inconsistent with an intention to allow the acts of 1862 and 1864 to operate on the rights of the Central Branch Company without repeal or modification. Every presumption is against repeal by implication, and in favor of the obligation of the Government to carry out in *good faith* its compact with the Central Branch Union Pacific Railroad Company.

This act of July 3, 1866, is commonly known as the Smoky Hill bill, and had its origin in this wise: The Kansas Pacific Railway Company had failed to comply with the requirements and conditions of the acts of 1862 and 1864 in respect to that portion of "the road through Kansas" which lay west of the meridian of Fort Riley, and consequently had lost all the benefit of those acts so far as they related to that part of the road. (See opinion of Assistant

Attorney-General Smith, dated October 3, 1871.) In addition to this, that company had it in contemplation to initiate a new line of road to the Pacific coast by way of Arizona and New Mexico, on the 35th parallel. (See reports of surveys across the continent made in 1867-68 for the Kansas Pacific Railway Company, by General Wm. J. Palmer.) Its surveys of this route were not then perfected. But the parties believed that if Congress would first authorize the company to continue its road by way of the Smoky Hill Valley, in the direction of Denver, that then the Government would still further aid the company in its *new* enterprise. They accordingly applied to Congress for an act which would enable the company to construct a road in that direction. The result was the passage of the act of July 3, 1866.

Not only does this act not affect the rights of the Central Branch Company, but when it was under consideration in Congress its advocates openly disavowed any such purpose or intention. Of this we can furnish abundant evidence, if desired.

The act having been passed, the Kansas Pacific Railway Company proceeded to build west, along the Smoky Hill Valley. The act gave the company some aid in United States bonds, but no lands, and the road built in pursuance thereof was a *different* road from any provided for in the acts of 1862 and 1864. (See same opinion of Assistant Attorney-General Smith.) No road authorized by the acts of 1862 and 1864, west of the meridian of Fort Riley, has ever been constructed by that company. The road authorized by the acts of 1862 and 1864 was :

1. A road to be "*so located*" that the Central Branch Company could make connection therewith within the limits prescribed.

2. The route thereof, west of the meridian of Fort Riley, was "to be subject to the *approval* of the President of the "United States."

3. The route thereof, west of the meridian of Fort Riley,

was "to be *determined*" by the President of the United States on "actual survey."

The road built under the act of 1866 has not been *so located*. Its route has not been *approved* by the President of the United States. Its route has not been *determined* by the President of the United States upon *actual survey*. In short, in the language of the sixteenth section, it is not "one of the roads (then) *authorized as aforesaid*." It is not a road "*hereinbefore authorized* to be built," in "the general direction and route" of which the Central Branch Company was by that section authorized to continue the construction of its road. It is not a part of "*its said road*." It is not a part of "the road (then) *hereinbefore authorized* "to be constructed by it." It had neither existence in fact, nor authorization in law. It entered not into and formed no part of *the plan of roads* with reference to which the sixteenth section was enacted. The road west of the meridian of Fort Riley, the non-construction of which was provided against by the sixteenth section of the act of 1864, so far as the Central Branch Company is concerned, has never been constructed. Its *route*, even, has never been approved or determined. The *first* steps beyond authorization have never been taken toward the bringing it into existence. The grant to the Central Branch Company under the sixteenth section of the act of 1864 was made with reference to roads *then* "*authorized*," and was a grant *in presenti*. The words are, "and *is hereby* authorized to continue and extend." The grant is clear in its terms and free from all ambiguity, and of this grant the Central Branch Company cannot be divested by anything short of a repeal *in terms*, or a repeal by implication so full that both statutes cannot *coexist* or *stand together*, or in the nature of things *be executed*. But the statutes of 1864 and 1866 are capable of coexistence. They can stand together, and can both be executed. The Kansas Pacific Railway Company has acquired no lands nor bonds west of the meridian of Fort Riley, under the acts of 1862 and 1864. What bonds they acquired they acquired

under the act of 1866, and whatever lands they acquired they acquired by virtue of the provisions of the act of March 3, 1869.

The Central Branch Company asks nothing that is not clearly provided for by the acts of 1862 and 1864. It does ask that the provisions of the sixteenth section of the act of 1864 may be carried into execution, and that it may be permitted to complete its connection, without which one, at least, of the objects of these laws will have been defeated, and the investment which was made upon *the faith of these laws*.

I am supposing that it is a *duty* incumbent upon us to show clearly that the rights which the Central Branch Company acquired under the act of 1864 have not been *divested* by the act of 1866. But, in truth, *no such duty is incumbent upon us*. It is an entire mistake that this rule has any application to this case. On the contrary, the rule applicable to this case is precisely the *reverse*. That rule is, that where Congress has in clear and unmistakable terms made a legislative grant, he who relies upon a subsequent *proviso* or *amendment* to annul the grant must show *clearly* and beyond *doubt* that such is the effect of the proviso or amendment both in its *language* and in its *intent*.

In support of this I will quote two important decisions.

In the case of *Thornhill vs. Hall*, (2 Clark and Finnelley's House of Lords cases, p. 36,) Lord Chancellor Brougham, in 1833, in delivering the opinion of the court, announces the general rule of construction in this strong and emphatic language, and it is equally applicable to the expressed will of a testator, which was the subject of consideration then, and the expressed will of a legislature, which is the subject of consideration now :

“ I hold it to be (said he) a rule that admits of no exception in the construction of written instruments, that where
 “ one interest is given, where one estate is conveyed, where
 “ one benefit is bestowed in *one* part of an instrument by
 “ terms clear, unambiguous, liable to no doubt, clouded by
 “ no obscurity, by terms upon which, if they stood alone, no
 “ man breathing, be he lawyer, or be he layman, could en-

“tertain a doubt—in order to reverse that opinion, to which
 “the terms would of themselves, and standing alone, have
 “led, it is not sufficient that you should raise a *mist*; it is
 “not sufficient that you should create a *doubt*; it is not suf-
 “ficient that you should show a *possibility*; it is not
 “even sufficient that you should deal in *probabilities*; but
 “you must show something in *another* part of that instru-
 “ment which is as decisive the one way as the other terms
 “were decisive the other way; and that the interest *first*
 “*given* cannot be *taken away* either by *tacitum* or by *dubi-*
 “*um*, or by *possibile*, or even by *probabile*, but that it must
 “be taken away; and *can only* be taken away, by *expressum*
 “*et certum*.”

Again, in the case of the *United States vs. Dickson*, 15 Peters, p. 165. Mr. Justice Story, in 1842, in delivering the opinion of the court, says:

“Passing from these considerations to another which
 “necessarily brings under review the second point of ob-
 “jection to the charge of the court below, we are led to the
 “general rule of law which has always prevailed and be-
 “come consecrated almost as a maxim in the interpretation
 “of *statutes*, that where the enacting clause is general in
 “its language and objects, and a *proviso* is afterwards
 “introduced, that proviso is construed strictly, and takes
 “no case out of the enacting clause which does not fairly
 “fall within its terms. In short, a proviso carves special
 “exceptions only out of the enacting clause, and those who
 “set up any such exception must establish it as being
 “*within the words* as well as *within the reason* thereof.”

It is true that one of these cases refers to a *proviso*, and the other to what may be termed an *after-clause*. But if this be the law with reference to *provisos* and *after-clauses*, which form parts of one and the same act or instrument, with how much greater force does it apply the *provisos* and *clauses* of an *act* subsequently passed.

I have already shown that this act of 1866 has no effect whatever upon the rights which the Central Branch Company acquired under the 16th section of the act of 1864. But in the light of these decisions *no such duty* is incumbent upon us. Unless the act of 1866 has clearly and un-

mistakably taken away the rights of the Central Branch Company, those rights remain to-day in all their original force. He who asserts that this act of 1866 has *divested* the Central Branch Company of the right in question must show it by language which, according to Lord Brougham, must be *expressum et certum*; or, according to the Supreme Court of the United States, he must show that the right of the Central Branch Company has been divested *within the words*, as well as *within the reason*, of the act of 1866.

II. But let us then take a closer view of the act of 1866, and, in so doing, let us examine, first, the *condition of things* at the time of the passage of the act, and, second, the *nature and character* of the act itself.

First, as to the *condition of things* at the time of the passage of the act.

The 16th section of the act of 1864 had provided that the Central Branch Company, "upon the completion of its road" as hereinbefore provided, shall be entitled to and *is hereby* "authorized to continue and extend the same, under the circumstances," &c. That is, the Central Branch Company had been authorized to continue and extend its road, in case of the non-construction by the Kansas Pacific Railroad Company of "*its said road*." This road called "*its said road*" is further described in the context in the 16th section as a road then "*authorized as aforesaid*;" a road then "*forming, or intended or necessary to form, a portion of a continuous line from*" Atchison "*to the Pacific coast*;" a road "*the general direction and route*" of which had been provided for; a road which was then "*hereinbefore authorized to be built*;" a road then "*hereinbefore authorized to be constructed*," &c.

Let us turn back and see what road this was. By the ninth section of the act of 1862, the company now known as the Kansas Pacific Railroad Company was authorized to construct "a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Mis-

“souri to the aforesaid point, on the one-hundredth meridian of longitude west from Greenwich, as herein provided.” This road was to be built upon the “same terms and conditions” as were provided for the construction of the “main trunk,” excepting that, as has been stated, *additional* terms and conditions were imposed upon this company. Among the first-mentioned terms and conditions is this: that “*within three years* after the passage of this act the said company shall designate the general route of said road, as near as may be, and file a map of the same in the Department of the Interior.” And among the additional terms and conditions referred to is this: that “the route in Kansas west of the *meridian of Fort Riley* to the aforesaid point on the one-hundredth meridian of longitude, to be subject to the *approval* of the President of the United States, and *to be determined* by him upon *actual survey*.” The road was to connect with the Union Pacific railroad *at the one-hundredth meridian of longitude*; but the ninth section of the act of 1864 provided as follows:

“*And provided further*, That any company authorized by this act to construct its road and telegraph line from the Missouri river to the initial point aforesaid may construct its road and telegraph line so as to connect with the Union Pacific railroad *at any point westwardly of such initial point*, in case such company shall deem such westward connection more practicable or desirable, and in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits and *be subject to all the conditions and restrictions* of this act: *Provided further, however*, That the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided if the same had united with the Union Pacific railroad on the one-hundredth degree of longitude, nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided.”

It will be observed that this section did not *repeal* the provision of the act of 1862, that the route west of the

meridian of Fort Riley shall be *approved by the President*, and be determined by him upon *actual survey*, nor did it repeal the provision that *within three years* after the passage of the act the company shall designate the general route of its road, as near as may be, and file a map of the same in the Department of the Interior. On the contrary, it expressly provided that the company "shall be entitled to all the "benefits and be subject to all the conditions and restrictions of this act." If the company elected and availed itself of this latter provision, it became necessary not only that its route should be *approved* by the President and *determined* by him upon actual survey, but also that a map designating its general route should be filed in the Department of the Interior *within three years* from the passage of the act of July 1, 1862. The company had its *option* to connect with the Union Pacific railroad either *at* the one-hundredth meridian or *west* of that meridian. But it could not do both. It was obliged to elect within three years. It did elect, and on the 1st day of July, 1865, filed a map in the Interior Department designating a route connecting with the Union Pacific railroad *at the one-hundredth meridian*. This being done, it was, as to this subject, *functus officio*. It no longer had the right to connect west of the one-hundredth meridian. Having elected to connect at the one-hundredth meridian, it could not thereafter change its route without the consent of Congress.

"The statutory provision that the general route '*shall*' 'be designated on a map filed in the Department '*within*' '*three years*,' is the legal equivalent of the provision that 'the designating of the route upon such a map shall not be 'made *after that time*.'" (Opinions of Attorneys-General, vol. XI, p. 462.)

But further, it did not obtain the *approval* of the President to its route west of the meridian of Fort Riley to the one-hundredth meridian. There is no evidence that there ever has been any *actual survey* of that route, or that the President has ever been called upon to *approve* or *determine*

it, or that he ever has approved or determined the route in Kansas west of the meridian of Fort Riley. But the route had to be *approved* by the President and *determined* by him upon *actual survey*, and without this being done how was it possible for the company to *designate* its route and file a map thereof; no matter whether the route be general or special? May it not therefore also be said that the company was *functus officio* in respect to its authority to construct a road west of the meridian of Fort Riley?

It appears, then, that this road which the Kansas Pacific Railroad Company was authorized to build, if it was to connect with the Union Pacific railroad at all, was to connect *at the one-hundredth meridian*, and it also appears that from *neglect* on the part of the Kansas Pacific Company to comply with the conditions and requirements of the law, and to procure the *approval* of the President of the United States to its route, that *after the first day of July, 1865*, they had *no authority to construct any road whatever extending beyond the meridian of Fort Riley*.

By an examination of section 10 of the act of 1862, and section 5 of the act of 1864, we find that the Kansas Pacific Company was to complete one hundred miles of its road, commencing at the mouth of the Kansas river, within three years after filing its assent to the conditions of the act, and one hundred miles per year thereafter, until the whole was completed. And by joint resolution approved May 7, 1866, the time for the completion of the second one hundred miles thereof was extended to the 27th day of June, 1867, and the time for the completion of each succeeding one hundred miles was extended in like manner. *This time has long since expired*, and yet no road from the meridian of Fort Riley to a connection with the Union Pacific Railroad at the one-hundredth meridian has been constructed. *This being the case*, the Central Branch Company became entitled and authorized to continue and extend its road to a connection with the main trunk at the one-hundredth meridian. Both companies—the Kansas

Pacific Company and the Central Branch Company—were authorized (“hereby authorized” are the words of the statute) to build this *connecting link* between the *meridian of Fort Riley* and the *one-hundredth meridian*, on complying with certain terms and conditions, the only difference between the two companies being *priority of right* to construct. The Kansas Pacific Company had priority of right upon compliance with certain terms and conditions, but a time was designated in which that right was to be exercised. That time having expired, and the right on the part of the Kansas Pacific Company not having been exercised, the right of the Central Branch Company to continue and extend its own road, and thereby construct this connecting link, stands as though the Central Branch Company had from the beginning been *the only company authorized to construct the road in question*. You may have priority of right over me, on complying with certain terms and conditions, to the only remaining seat in an overland stage-coach about to start over the plains for the Pacific, provided that you avail yourself of that right by a given time. If that time has elapsed, and you have not complied with the terms and conditions, and therefore not availed yourself of the right, my right to the seat would be as clear as though I alone had the right from the beginning. So, here, the Eastern Division Company had priority of right over the Central Branch Company to construct this connecting link, provided it availed itself of that right by a given time. That time, however, having elapsed without the Kansas Pacific Railway Company availing itself of its right, the right of the Central Branch Company to continue and extend its own road and make the connection in question stood *as though it alone had the right from the beginning*.

The condition of things, therefore, which existed at the time of the passage of the act of 1866 was this: *First*, the Kansas Pacific Railway Company had not availed itself of the privilege of making a connection with the Union Pacific Railroad *west of the one-hundredth meridian*; *secondly*, it

had not complied with the terms and conditions which were requisite in order to enable it to continue its road *west of the meridian of Fort Riley*; and *thirdly*, the Central Branch Company was authorized—"hereby authorized"—*to continue and extend its own road to a connection with the Union Pacific railroad at the one-hundredth meridian.*

Second. As to the *nature and character* of the act itself.

Under this head I assert that the act of 1866 is in effect a *new franchise* to the Kansas Pacific Railway Company so far as it relates to *that portion of its road lying west of the meridian of Fort Riley.*

In support of this I assert, first, that it authorizes that company to construct a road west of the meridian of Fort Riley which *it was not authorized to construct at the time* of the passage of the act. This, in view of what has been said, is self-evident, and needs no comment.

I assert, secondly, that, in the construction of the road authorized by the act of 1866 west of the meridian of Fort Riley, *it was not entitled to any of the benefits of the acts of 1862 and 1864.* It received neither *bonds nor lands* by virtue of the provisions of those acts; but whatever lands or bonds it has obtained have been obtained by virtue of the positive enactments of the act of 1866 and of an act passed on the 3d of March, 1869. The act of 1866 required the Secretary of the Interior to *reserve the lands from sale* on its new line, and contained a proviso that the company should be entitled to "the same amount of bonds" as it would have been entitled to had it connected its road with the Union Pacific railroad at the one-hundredth meridian, "as now required "by law," and that it should connect its line with the Union Pacific railroad at a point not more than fifty miles west of the meridian of Denver.

It will be observed that the act required the Secretary of the Interior to *reserve* the lands from sale, but the disposal of these lands Congress reserved to itself for future consideration.

The question as to whether the Kansas Pacific Railway Company acquired any lands *west* of the meridian of Fort Riley by virtue of the acts of 1862, 1864, or 1866, has been under consideration and passed upon in the Interior Department. The Secretary, as we have stated, held that the company acquired *no lands west of the meridian of Fort Riley by either one of these acts*, but that they were acquired solely by virtue of the provisions of the act of March 3, 1869. In the opinion accompanying this decision of the Secretary of the Interior the Assistant Attorney-General says :

“There is a grant to the company of the same amount of bonds that it would have been entitled to had it completed its road to the one-hundredth meridian.

“Congress must have supposed that *the law as it then stood did not give these bonds* to the road, otherwise it would have been silent on the subject. It is not to be presumed that it would have done or did do *a vain or needless thing*. It had its *special attention* directed to this grant, and *it gave the bonds and no lands*. This fact is very satisfactory evidence to my mind that Congress did not intend that the company should have an amount of lands equivalent to those which it would have been entitled to had it gone to the one-hundredth meridian. If it had, *it would have said so* when it was giving the equivalent amount of bonds.”

From this it appears that we are not left alone to the irresistible conclusions of logic in determining the nature and character of this act of 1866, but that the Executive Department of the Government has passed upon this subject, and, in fact, declared it to be a *new franchise* to the Kansas Pacific Railway Company, as respects all that portion of the road lying west of the meridian of Fort Riley.

If we were to stand before the Supreme Court of the United States and were to quote decisions of that Court, we would consider that the Court was bound by those decisions. So, in like manner, in standing before the Executive Department of the Government, we quote its decisions, and insist that the Executive is bound thereby. And the decis-

ion which we quote is not a decision in some parallel case, but in the *very case under consideration*; and we call your attention not to the decision alone, but to the fact that lands on the line of the *new road* of the Kansas Pacific Company have been, in consequence of that decision, *actually patented to another company* whose rights were in no way superior to those of the Kansas Pacific Company, if so be the Kansas Pacific Company had any right whatever to such lands under the acts of 1862 and 1864.

The fact is, the Kansas Pacific railway company in respect to that portion of its road lying west of the meridian of Fort Riley is not a legitimate member of the family of companies that own and control the Pacific railroad as a unit. Its road is not constructed on the *same terms and conditions*, nor the subject of the *same law*.

III. But, again, if you make a specific application of the 16th section of the act of 1864 to the case before us, you will find that it is a covenant with *us* for *our* benefit; that its effect was to make us feel that we were not *dependent* on the action of other companies. Whether *other* companies assented to the law or not, (by filing the "*assent*" provided for by the act of 1862,) or whether, having assented, they fulfilled the *obligations* which they thereby incurred or not, were matters in which we were not concerned. We were effectually protected in the fact that the *benefit* of a "*continuous connected line*" was absolutely secured to us. The contract is in writing. It is not oral. Its terms are plain. It is impossible to alter it without at least making *some reference* to it. *New* rights or *new* franchises may be given to other parties, but they do not affect us.

I have already said that nothing short of a *repeal of the 16th section*, or a *repeal of our rights* under it, can *divest those rights*; and that repeal must either be a *repeal in terms*, expressed in fit and apt language, about which there can be no misunderstanding, or a *repeal by implication*, so full and so complete that both statutes *cannot stand together* or *co-exist*, so that both *cannot*, in the nature of things, *be executed*.

If the act of July 3, 1866, had contained a section as follows:

“*And be it further enacted, That the 16th section of the Pacific railroad act, approved July 2d, 1864, so far as it relates to the Central Branch Union Pacific Railroad Company, together with all benefits, advantages, rights, and privileges thereby secured to the Central Branch Union Pacific Railroad Company, be, and the same is hereby, repealed*” —

Then we would be compelled to admit that we had no *status* before you. But such is not the case; and the more we examine it the more the conclusion will press itself upon us that *some such provision is essential in order to divest the rights secured by the 16th section of the act of 1864*. I am at a loss to see how it is possible to divest those rights, except by a *reference in terms* to the 16th section, or to the Central Branch Railroad Company itself.

The act of 1866 not only contained no such reference, but, as the Hon. Benjamin R. Curtis says, “every one of its claims is consistent with an intention to allow the acts of 1862 and 1864 to operate on the rights of the Central Branch without repeal or modification.”

The Hon. Mr. Hoar, in an opinion given by him prior to his being retained in this case, declares that “the result of construing the legislation of 1866 as depriving the Central Branch Company of the right guaranteed by the acts of 1862 and 1864, after the expenditure of its money, would be so contrary to *all the requirements of justice*, and so subversive of *the public faith*, that nothing but the *clearest expression* of the legislative will could justify such a construction.”

After a careful examination of the act of 1866 we find it to be no more nor less than legislation granting a *new franchise* to the Kansas Pacific Company in respect to all that portion of its road lying west of the meridian of Fort Riley. It tells that company that it may select a *new* route for itself—a route *other* than that “now required by law.” It

tells it that it shall have a certain amount of aid in the construction of a road on their new route in United States bonds, but it does not provide that they shall have lands. It makes an *additional* draft upon the Treasury, and, by the further legislation of March 3, 1869, upon the lands. But, as Mr. Evarts says, "this *additional* draft upon the "Treasury and upon the lands is not to be imputed to *our* "demand, which stands upon the *old law* and *old* purposes "—upon the common and obvious purpose in having that "connection built; but is to be attributed to the *new action* "of Congress."

It makes no allusion to the Central Branch Company. It neither *detracts from* nor *adds to* any of its rights. It leaves that company just where the law found it, with the acts of 1862 and 1864 "to operate on its rights, without repeal or modification." Those laws had already declared and defined the rights of that company, and had (in addition) provided that the failure of *any* company to fully comply with the acts of 1862 and 1864 should not impair "the rights, "privileges, or franchise of any *other* company that shall "have complied with the same."

A connection with the Union Pacific railroad had already been assured to the Central Branch Company. If the Kansas Pacific Company connected its "line with the "Union Pacific railroad on the 100th degree of longitude, "as now required by law," very well. But if not, *that state of things had been provided for by the 16th section of the act of 1864*, which, in that event, authorized the Central Branch Company to continue and extend *its own road* to a connection with the Union Pacific railroad on the 100th degree of longitude.

Now, to say that the act of 1866 was *intended* by Congress to deprive the Central Branch Company of its *right to continue its own road* to a connection with the Union Pacific at the one-hundredth meridian is to say that Congress intended *what it did not express*.

As to whether Congress *reserved*, in the acts of 1862 and 1864, the right to alter, amend, or repeal these acts, or in what *form* they made such reservation, is entirely immaterial. The question is, *What has Congress done?* And the answer is, that *they have done nothing* which *divests* the Central Branch Company of any right secured to it by the acts of 1862 and 1864. It certainly is not to be *presumed* that Congress, under any reserved power, intended to *destroy* the road of the Central Branch Company, which its own legislation had caused to be constructed.

Sir, the 16th section of the act of 1864 is the *king-bolt* of the Pacific railroad. It *fastens together* all its different parts. It was wisely prepared with that object and intent. It is a solemn act of Congress, and it requires an act of equal character to *annul* it. The act of July 3, 1866, expresses no *such purpose*.

3.—A POSITION ADVERSE TO THE CLAIM OF THE CENTRAL BRANCH COMPANY IS ABSURD, AND CANNOT BE MAINTAINED.

There is so much in the case before us that is geometrical in its character that it enables us to reach conclusions which are absolute and certain. The demonstrations which we have already presented are direct in their character, and are not unlike those demonstrations in geometry where we establish that *quod erat demonstrandum*. But there is another form of demonstration to which resort is not unfrequently made, where, instead of demonstrating the truth of the proposition, we show that the opposite thereof is absurd. This form of demonstration is known as *reductio ad absurdum*. It has its origin in the well-established principle that all truths are consistent and in harmony with each other. If we have before us one proposition which is true, and another proposition is advanced which is inconsistent with the former, we may rely upon it that the latter cannot be sustained—that the premises taken are false.

Let us assume that the proposition is advanced that the Central Branch Company is *not* entitled to the right which

it claims. Such a proposition is inconsistent with the title of the act—with the words, “*a railroad and telegraph line,*” and with the words, “*from the Missouri river to the Pacific ocean.*”

It is inconsistent with the reason given why the track upon the entire line of railroad and branches shall be of uniform width, viz: “so that when completed cars can be run *from the Missouri river to the Pacific coast.*”

It is inconsistent with the provision “that the whole of said railroad and branches and telegraph line shall be operated and used for all the purposes of communication, travel, and transportation, so far as the public and Government are concerned, *as one connected and continuous line.*”

It is inconsistent with the wisdom of the provision “that the companies herein named in *Missouri, Kansas, and California* filing their assent to the provisions of this act shall *receive and transport* all iron, rails, chairs, spikes, timber, and all material required for constructing and furnishing said *first-mentioned line.*”

It is inconsistent with the provision “that any *other* railroad company now incorporated, or hereafter to be incorporated, shall have the right to connect their road with the road and branches provided for in this act.”

It is inconsistent with the provision “that in case said company or companies shall fail to *comply with the terms and conditions* of this act *by not completing* said road and branches and telegraph within a reasonable time,” &c., “Congress may pass an act to secure the *speedy completion* of said road and branches,” &c.

It consigns the Central Branch Company at once to the *ruthless and mocking destruction* which follows from the provision—

“That if *said roads* are not completed so as to form a *continuous line* of railroad ready for use from the Missouri river to the navigable waters of the Sacramento river in California by the first day of July, 1876, *the whole of all of said railroads before mentioned* and to be constructed under

“ the provisions of this act, together with all their furniture, fixtures, machinery, shops, lands, tenements and hereditaments and property of every kind and character, *shall be forfeited to, and be taken possession of by the United States.*”

It is inconsistent with the wisdom of the provisions of the 18th, 19th, and 20th sections of the act of 1862.

It is inconsistent with the act of March 3, 1863, establishing the gauge of the Pacific railroad and its branches throughout their whole extent, *from the Missouri river to the Pacific coast*, at four feet eight and one-half inches.

It sets at *defiance* the provision of the seventh section of the act of 1864, that “ the failure of *any one* company to “ fully comply with the conditions and requirements of this “ act and the act to which this is amendatory *shall not work a “ forfeiture of the rights, privileges or franchise of any other “ company or companies that shall have complied with the “ same.*”

Let us pause for a moment over this provision.

The Kansas Pacific Company has failed to comply with the conditions and requirements of the acts of 1862 and 1864, and the statute says that this failure “ shall not work a forfeiture of the rights, privileges, and franchise ” of the Central Branch Company.

A forfeiture is defined by Webster to be “ the *losing* of “ some right, privilege, estate, power, office, or effects by “ an offence, crime, breach of condition, or other act.”

The chief *right, privilege, or franchise* which the Central Branch Company acquire under the act of 1862 was the *right* to construct “ one hundred miles in length next to the “ Missouri River,” and for and in aid of the construction thereof to receive lands and bonds, (the one hundred miles being a part of “ a railroad and telegraph line from the “ Missouri river to the Pacific ocean.”)

But it was found that this *right, privilege, or franchise* was insufficient, and that it was necessary that it be *enlarged*. The result was that it was *enlarged*.

The *right, privilege, or franchise* which the Central Branch Company acquired under the act of 1864 gave it the *right* to construct a railroad and telegraph line *all the way from the Missouri river to the one-hundredth meridian*, and to receive in aid of the construction thereof lands and bonds, *unless* another branch, called "The road through " Kansas," (forming a part of the *then* " *authorized* " *plan*,) should be constructed by a date specified, in which event the road and telegraph line of the Central Branch Company was to connect and unite with the latter.

The 16th section, after declaring that the company, "upon " the completion of its road, *shall* be entitled," adds "and " *is hereby* authorized to continue and extend the same." The *tense* is changed from the *future* to the *present tense*; showing a *present* right, privilege, or franchise—a grant *in presenti*.

But this was not the only right. Section 12 of the act of 1862 provided that "the whole line of said railroad and " branches and telegraph shall be operated and used for all " purposes of communication, travel, and transportation, so " far as the public and Government are concerned, *as one " connected, continuous line*." And section 15 of the act of 1864 provided that "in such operation and use to afford and " secure to each *equal advantages* and *facilities* as to rates, " time, and transportation, without ANY discrimination of any " kind in favor of the road of any or either of the other " companies, or adverse to the road or business of any or " either of the others."

Had the Kansas Pacific Company complied with the conditions and requirements of the acts of 1862 and 1864 the Central Branch Company would have had a *connection*. And if the Kansas Pacific Company did not comply, provision was made by the 16th section of the act of 1864 for continuing and extending the Central Branch Company's *own* road until a *connection* was made.

The right to a *connection*—the right of being an *integral part* of the *unit*—the benefits resulting from being a *part*

of "*one connected, continuous line*"—the right to "*equal advantages and facilities* as to rates, time, and transportation, without any discrimination of any kind"—in short, in the language of the 16th section of the act of 1864, the right "to have ALL the *benefits* thereof, as *fully* and as *completely* as are herein provided touching such consolidated organization," to which that section says it "*shall be entitled*"—these constitute the "*rights, privileges, or franchise*" of the Central Branch Company referred to in this 7th section of the act of 1864, and Congress has declared that the Central Branch shall not be deprived of them by the failure of the Kansas Pacific Company or any other company to comply with the acts of 1862 and 1864.

The position assumed deprives the Central Branch Company of all these "*rights*" and "*privileges*," and therefore cannot be maintained.

But further, the proposition sets at *naught* the 16th section of the act of 1864, a section which directly contemplated the particular state of facts which has now arisen, and which evinces upon the part of its author a most complete and perfect comprehension of the end in view, the object to be attained, and the contingencies to be provided for.

It charges Congress with doing "*a vain and needless thing*."

It charges them with the folly of the expenditure of a *large amount of public treasure* with no other object in view than to entice and then crush those who should put faith in the promises of the Government.

It is an outrage upon justice, and stands condemned before good law and public morals.

It is taking a position which cannot be reconciled with the true rule of construction of even *ordinary* legislative grants.

The Hon. Benjamin R. Curtis, whose words are words of wisdom, and whose utterances have gone into the books, some from his own pen, and others through the conviction which they have carried to courts and public officers, in addressing the Secretary of the Interior upon a recent occasion, when an *ordinary* land-grant was under consideration, said :

“Now the learned counsel has begun, and very properly begun, by propounding a rule for the construction of this grant, and he has adduced here some pretty *intense* statements from an opinion of Attorney-General Black in propounding that rule and applying it to some case which was before him. As we all know, who know and respect that very able and eminent gentleman, he has an element of intensity in his character which makes itself felt in what he says; and there are expressions in that opinion announcing this rule which have been so much harped upon here—that a public grant must be so clear that *no doubt* can be raised and entertained by *anybody* concerning it, which would *annul in effect* nearly *all* public grants. I do not understand that to be a safe expression of the rule. I believe the best statement of the rule, certainly the best statement of it that I have seen, is the most recent statement in the case of the Binghampton Bridge.”

Mr. Curtis then quotes the rule of construction as laid down in the case of the Binghampton Bridge in 3 Wallace, page 74, and adds: “This I believe to be, as it is the *latest*, also the *best* exposition of this rule.”

But, as I shall presently show by overwhelming testimony, the *grants* under the Pacific Railroad laws are *not ordinary* legislative grants, and are not, therefore, to be construed by even the less rigid rule laid down in the case of the Binghampton Bridge.

Before leaving, however, the proposition under consideration, I wish to add one additional thought in further confirmation of its absurdity.

I do not wish to make infamous comparisons, but I have a precedent, and follow the example of Vattel in referring to the following historical incidents to illustrate my point:

Mahomet, Emperor of the Turks, at the taking of Negropont, having promised a man to *spare his head*, caused him to be cut in two in the middle of the body.

Timur, known as Tamerlane the Great, Emperor of Tartary, after he had besieged the city of Sebastia for eighteen days, agreed upon terms of surrender, wherein he promised

the garrison that if they would surrender, *no blood should be shed*. The garrison of Sebastia surrendered, but Timur caused four thousand of their number to be buried alive.

Vattel, speaking of these incidents, says :

“Gross subterfuges these, which, as Cicero remarks, only serve to aggravate the guilt of the perfidious wretch who has recourse to them. To spare the head of any one, and to shed no blood, are expressions which, according to common custom, and especially on such an occasion, manifestly imply to spare the lives of the parties.”—*Vattel's Law of Nations, Lib. 2, chap. 17, sec. 273.*

But if you will examine the letter of the promises made in these cases, you will find that the practical interpretation given by Mahomet and Tamerlane to their respective promises is less absurd than the proposition we are considering, for the language in the case before us is, that the Central Branch Railroad Company, under the circumstances named, “*shall be entitled to, and is hereby authorized to, continue and extend,*” &c., and for and in aid thereof “*shall be entitled to similar and like grants, benefits,*” &c. However infamous may have been the act of the tyrant Tamerlane in burying alive four thousand of the confiding garrison of Sebastia, yet his offence against the *letter* of the promise and the *laws of construction* was less than would be that of the Government in denying to the Central Branch Railroad Company the right to extend its road, thus burying in the grave of financial ruin men who confided in promises which were made to induce them to do what they have done.

4.—THE GRANTS IN AID OF THE PACIFIC RAILROAD ARE NOT ORDINARY LEGISLATIVE GRANTS.

But, sir, there is a thought that rises above all that I have said. If we examine into any rule of construction, we shall find the reasons for it; we shall find that the rule of law results from the logic of the case, that the logic and the law lay alongside of each other, the latter the offspring of the former.

I propose to show that the *grants* in aid of the *Pacific railroad* are *not ordinary* legislative grants ; that the *logic* of the latter does not apply thereto, and therefore the *law* of the latter does not apply.

In the construction of statutes there is one rule which is *fundamental*, and which *holds all other rules in subjection*. That rule, in the language of Blackstone, is this :

“ The *primary* rule in the interpretation of a statute is to ascertain the *intention* of the law-makers. This is the *life* of the statute, as well as the *object* and *reason* of its creation.”

In order to ascertain the *object* which Congress had in view in the passage of the Pacific railroad act of 1862, let us examine—

First, the *surrounding facts and circumstances* in the presence of which that act was passed ; and

Second, the *provisions* of the act and the *declarations* of Congress made at the time.

Let us compare the surrounding facts and circumstances in *this case* with the facts and circumstances surrounding *ordinary* legislative grants which are construed in accordance with the rule already laid down.

In *Parker vs. the Great Western Railroad Company*, (7 Manning and Granger, p. 253,) the court used the following language :

“ It is to be observed that this language of the acts of Parliament is to be treated as the language of the *promoters* of them. *They ask* the legislature to confer great privileges upon them, and profess to give the public great advantages in return. Acts passed under *such* circumstances should be construed strictly *against the parties obtaining them*, but *liberally in favor of the public*.

Lord Chief Justice Tenterden, of the King's Bench, did not hesitate to declare that—

“ An act of Parliament passed for the benefit of a canal or railway company is a bargain between a

“*company of adventurers* and the public, the terms of which are expressed and set forth in the act, and that the rule of construction in all such cases is now fully established to be, that any ambiguity in the terms of the contract must operate *against the adventurers* and *in favor of the public*, the former being entitled to claim nothing which is not clearly given to them by the act.”

In the case of the Dubuque and Pacific Railroad Company, *vs* Litchfield, (23 Howard, p. 66,) the court in delivering the opinion stated the reason of the rule to be, that—

“*Parties seeking grants for private purposes* usually draw the bills making them, and if they do not make the language sufficiently explicit and clear to pass everything which is intended to be passed, *it is their own fault*; while on the other hand such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking by ingenious interpretation that which cannot be obtained by plain and expressed terms.”

These are but sample cases, and it will be seen that they are all cases where the legislative grant was sought by *private* parties—by the “*promoters*” of the enterprise, or, as Lord Chief Justice Tenterden terms them, “*adventurers.*” They are cases between the *public*, on the one hand, and the *promoters* or *adventurers* on the other, and the rule of construction is that these acts are to be construed *in favor of the public*.

In the case under consideration, is such the case? Far from it. The object of the statute was not to advance the interests of certain promoters or adventurers. The Pacific railroad was not in any sense a *private* enterprise, but emphatically a *national undertaking*. All parties had united in declaring it a *public necessity*. It was so declared in 1860 by both political parties into which the American people were divided.

In the Republican Convention it was—

“*Resolved*, That a railroad to the Pacific ocean is imperatively demanded *by the interests of the whole country*; that the Federal Government ought to render immediate and effective aid in its construction.”

And in the Democratic Convention it was—

“*Resolved, That one of the necessities of the age, in a military, commercial, and postal point of view, is a speedy communication between the Atlantic and Pacific States, and the Democratic party pledge such constitutional aid as will secure the construction of a railroad to the Pacific coast at the earliest practicable period.*”

War was upon us. We were in danger of losing our Pacific possessions. Mr. Campbell, of Pennsylvania, when the bill was under consideration in the House, said :

“The necessity is upon us. The question is *whether we shall hold our Pacific possessions* and connect the nations of the Pacific with those of the Atlantic slopes, or *whether we shall abandon our Pacific possessions.*”

The Hon. Benjamin R. Curtis, in speaking of these acts, says :

“In construing these acts I suppose no one will doubt that *all the surrounding circumstances*, in the presence of which and with reference to which the acts were passed, should be taken into consideration and allowed their due and proper weight, and this whether these surrounding circumstances appear in the *acts* themselves, or are a part of the known *history* of their subjects.”

Again :

“It is a well-known part of the political history of the country that in the presence of these great facts, all parties, whatever may have been their previous opinions concerning the power of the General Government to engage in internal improvements, united in declaring this to be a *national* work, in the prosecution of which the Government of the United States might properly engage, and that the time, manner, and extent of doing so were merely questions of detail.”

He further adds :

“The United States did not engage in this grand enterprise, of such importance to itself, and hold out inducements to private persons to engage in it, simply and solely

“as ‘donors’ in relation to ‘donees.’ This was *not* an enterprise of PRIVATE persons having some local interests to be promoted by an act of incorporation, or of capitalists desiring a profitable investment in some work which might be of incidental advantage to the public.”

“In its origin, in its character, and in its uses it was unmistakably an enterprise of the Government of the United States, and so far as individual citizens were induced to engage in it they were induced by the Government to engage in an enterprise of the Government.

“To apply to this legislation *rigid rules* drawn from the common law concerning grants of the Crown, *ex mero motu*, or even the somewhat more liberal constructions of acts of legislatures granting special privileges in derogation over the common right of the citizen, would be *grossly unjust*.”

He further adds:

“There is no assumption made that the United States was simply ‘a donor,’ or that the United States, standing *outside* of this enterprise, and in the relation of a mere surety for the accommodation of a corporation, entered into certain obligations. It was *not outside* of the enterprise. It was its *originator* and *promoter* for its own immediate use and interests. It was not a mere surety. What it agreed to do was agreed to be done to advance and secure its own *great public interests*.” “It is no niggardly, grasping, and purely selfish spirit which this act displays. This was a *public work*. The United States was to have great advantages from its accomplishment and use.”

But we are not left alone to the *facts* and *circumstances* in the presence of which this act was passed to ascertain the *object* which Congress had in view. The act itself tells us in plain and unmistakable terms that it was *not* passed for the benefit of “*certain promoters*” or a “*company of adventurers*,” but that it was passed for *great public purposes*.

It was to be built “through the territories of the United States,” (sec. 8,) over which the United States had exclusive jurisdiction. In creating the principal corporation or instrument to be used in accomplishing the undertaking more than one hundred and fifty corporators were named, who were

selected from *nearly if not all* the loyal States of the Union. With them were associated "five commissioners, to be appointed "by the Secretary of the Interior." By the original act there were to be fifteen directors, two of whom were "to be "appointed by the President of the United States." By the amended act, twenty directors, five of whom were "to be "appointed by the President of the United States." These Government directors were "to act with the body of directors," and were styled "*directors upon the part of the Government.*" They were not required, like other directors, to be shareholders. "At least one of said Government "directors" was to be "placed upon each of the standing "committees," and "at least one on every special committee." They were "from time to time to report to the "Secretary of the Interior" the "condition, management, "and progress of the work." (Sec sec. 1, act of 1862, and sec. 13, act of 1864.)

But this is not all. The declaration that this act was not an act to promote the interests of "certain promoters," or a "company of adventurers," is set at naught by the open and clear declaration in the body of the act, (see sec. 18,) that the "*object*" of this act is "to promote the *public interest* and "*welfare* by the construction of said railroad and telegraph "line and keeping the same in working order, and *to secure "to the Government* at all times, but particularly in times of "war, the use and benefit of the same for postal, military, "and other purposes."

Here Congress have plainly declared that which takes this case out of the *ordinary* cases of legislative grants. They have left no room for construction. They have declared the "*object*" of this act to be to promote the "*public interest*;" to promote the "*public welfare*" by the construction of said railroad and telegraph line and keeping the same in working order, and "*to secure to the Government*" at all times, but particularly in times of war, the use and benefit of the same for postal, military, and other purposes.

Congress not only intended that the entire road, trunk and branches, should be completed, but they held out every inducement which they could to engage capitalists in the work, and to inspire their confidence.

Having ascertained the *object* that Congress had in view, we arrive at once at the *intention*, and in accordance with this intention the act should be construed. It having been passed to effect an object of great *public* utility and necessity and to promote the "*public interests and welfare*," the true rule of construction to be applied thereto is to be found in the *logic* of the case, and is this :

"Statutes tending to effect an *object* of great *public* utility ought to receive the most *liberal* and *benign* interpretation. *Ut res magis valeat quam pereat.*" (Baring vs. Erdman, 14 Haz. Pa. Reg., 129.)

It is true that the object sought for has been in part attained by the construction and completion of *other* branches of *this* road. But that is no reason why the Government should refuse to keep faith with *this* company—no reason why a great and powerful Government should crush those who have relied upon its *promises* which were made *to induce them to do that which they have done.*

Cicero says :

"Fundamentum autem justitiæ est fides, id est dictorum conventorumque constantia et veritas." (Cicero, Off. 1, 7;) "for *good faith* is the foundation of justice ; it is *constancy* and *truth* in *promises* and *contracts.*"

CONCLUSION.

Permit me, in conclusion, to ask at your hands a careful examination of the *affidavits of good faith* which have been filed in this case, and to keep in view the *position* in which parties have been placed in consequence of their (as we have shown) *just reliance* upon the *promises* of the Government.

I have a special purpose in calling your attention to these affidavits, and especially to the *wrong* and *injury* which have

already resulted to these parties by reason of the delay upon the part of the Government in recognizing their rights.

In order that this purpose may appear, let us suppose that the Pacific railroad laws are *not what we find them to be*, but fall short in their language of the *intent* of the parties, what, I ask, would then be the duty of a judge in considering the case, in view of the wrong and injury to which I have alluded?

We will find an answer to this question by going back to the days of Sir Henry Hobart, in language used by him in 1616, while sitting as Chief Justice of his Majesty's Court of Common Pleas—language which was afterward, in 1671, cited by Sir Matthew Hale while sitting as Chief Justice of the King's Bench, and to which he gave the approval of his great name; language which has been highly prized, not unfrequently referred to, and passed down until it has reached the text-books of our day, and in substance been announced from the Bench in our own country: "I exceedingly *commend*," says Lord Hobart, "the judges that are curious "and almost subtle, *astuti*, to invent reasons and means "to make acts according to the just *intent* of the parties, "and *to avoid wrong and injury* which by rigid rules might "be wrought out of the act." (Hob., 277.)

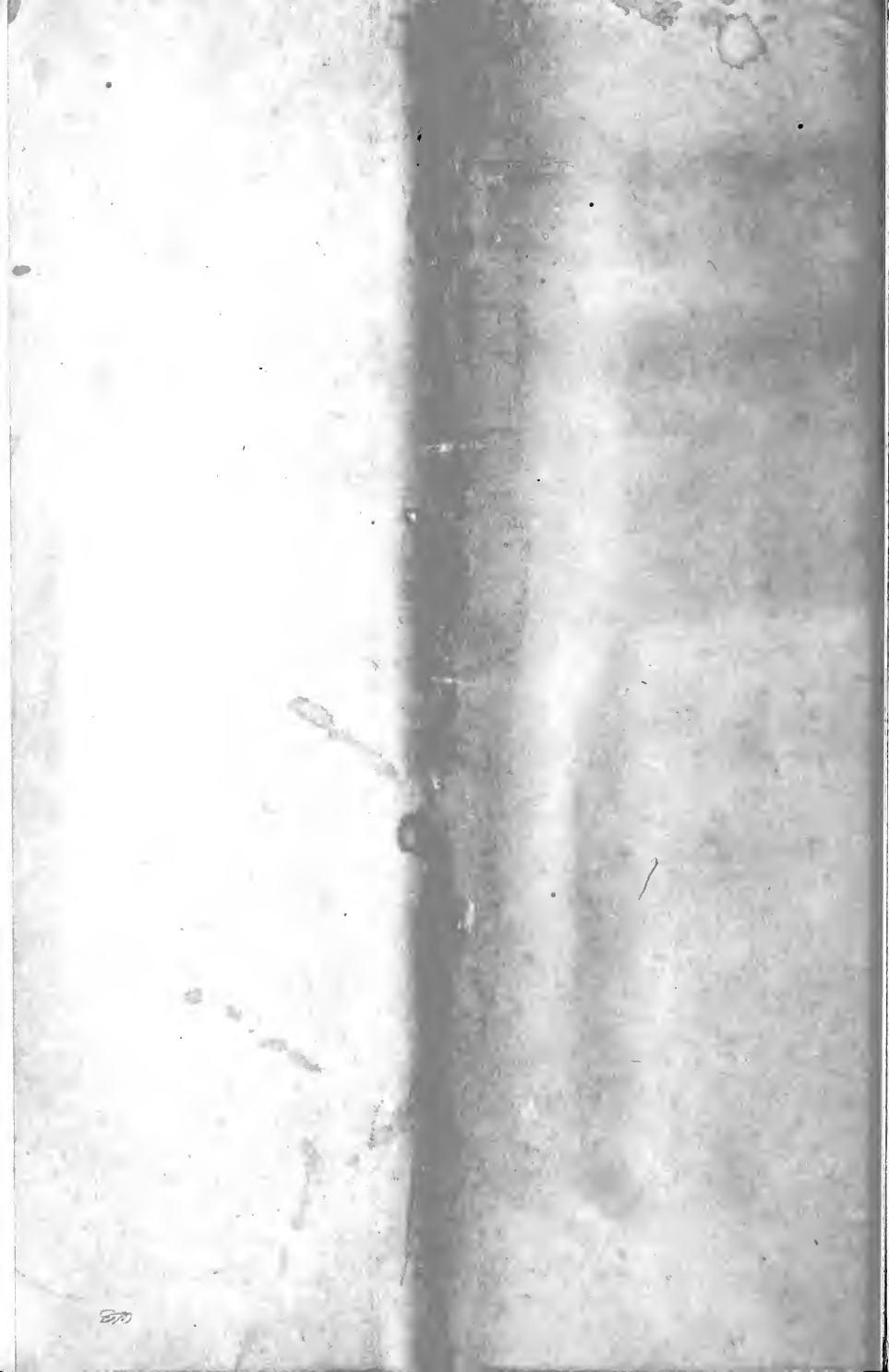
But, if judges, under the circumstances indicated by Lord Hobart, are to be *commended* in their efforts to avoid wrong and injury, *what measure of condemnation* is the just due of those who *seek*, not to avoid, but *to establish wrong and injury*, where by the application of even the most rigid rules, *nothing can be wrought out of the act* upon which to found even a *pretext* for so doing?

I have already trespassed too long upon your time, but my experience in the past has prompted me to be thus explicit in the statement of this case. I once did not trespass, and the result was that injustice stared us in the face, and we were asked what we proposed to do in the premises. Sir, standing as we are before "the Department "of Justice," a fitting title for one of the Executive Depart-

ments of a Government which was erected "to establish "justice," we cannot but believe that where there is a *wrong* to be remedied, or a *right* to be enforced, that there is something *to be done*, and that *this wrong will be remedied* and *this right enforced*. We certainly believe that this will be the case, if so be we shall succeed in communicating to you our views of this case—views that are neither hasty nor inconsiderate, but the result of careful reflection, and sustained by the leaders and lights of the profession.

















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